NOTICE OF ACCEPTANCE IN CONTRACTS OF GUARANTY.

Guaranty is a branch of contracts governed in general by the rules of law pertaining to that subject. Unfortunately, however, in many jurisdictions exceptions have sprung up in contracts of guaranty which have resulted in variant and conflicting views, leaving the subject in a state of confusion which requires the practitioner to make a minute study of the law of guaranty in the particular jurisdiction where his case arises. His previous knowledge of the law in his own State will probably tend to mislead rather than guide him in reference to certain phases of the law of guaranty elsewhere.

One is met at the outset with the problem whether or not he has a contract of guaranty. There may have been failure to give notice of acceptance, which, in other contracts, would not have been required. Or perhaps the law requires a demand or a notice of default on the part of the debtor or some other technicality, the performance of which has been omitted, because not required by any statutory provision and not a condition precedent to the enforcement of one's rights in any other form of contract.

The question of notice of acceptance in contracts of guaranty presents great conflict of authority and surrounds the present state of the law, bearing on that subject, with much interest. It will be important first to note the rules on this subject as found in contracts other than those of guaranty.

Lord Abinger in Vyse *v.* Wakefield[1] says:

> "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event, which may become known to him or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but when it is to do a thing that lies within the peculiar knowledge of the opposite party, then notice ought to be given to him."

[1] (1846) 6 Meeson & Welsby 442; Hayden *v.* Bradley (1856) 6 Gray 425.

"That," he says, "is the common sense of the matter and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle it is quite time that they should be overruled."

Baron Park in the same case says:

"No notice is requisite when a specific act is to be done by a third party named or even by the obligee himself; as for example where the defendant covenants to pay money on the marriage of the obligee with B, or perhaps on the marriage of B alone. . . . The party who, without stipulating for notice, has entered into the obligation to do these acts, is bound to do them."

In Com. tit. Plead., 75, it is said, on a promise to pay on the performance of an act by the promisee to a third person, the promisee need not give any notice, for the promisor takes it on himself to get notice at his peril.

In Makin *v.* Watkinson[1] Brummel B. referred to Fletcher *v.* Pynsett, quoted in Comyn's Digest, where it appears the defendant covenanted with the plaintiff that if he would marry the defendant's daughter, the defendant would assure him a certain copyhold. Here it was held, the plaintiff having married the daughter, was entitled to sue without giving notice. It was said that when the contract was conditional upon the doing an act by the third person, the duty was upon the promisor to take notice from such third person. It is there said that "if we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, *but cannot be in the knowledge of the defendant*, but the defendant can only guess or speculate about the matter, then notice is necessary." But wherever defendant has requested plaintiff to do an act and he does it, or to pay money to a third person and the money is so paid, defendant becomes bound as soon as the act is done or the money paid without notice from the plaintiff that he either intends to, or has complied with defendant's request. Only where notice is provided for will it be required in order to bind defendant.

In contracts of sales this question often arises. The courts uniformly hold that

[1] (1870) L. R. 6 Ex. 25.

"where the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer residing in one city receives an order for goods from a customer residing in another city, and fills the order by delivering the goods to a common carrier at the place of manufacture, consigned to such customer at his place of residence, the sale is complete and the title passes at the place of shipment."[1]

If one offers to pay another on condition of his doing a designated act, the performance of the act gives a right of action for the amount offered without any notice of acceptance unless notice is provided for.

The case of White *v.* Corlies and Tift[2] illustrates this rule, although there notice of acceptance was required. Defendant sent to plaintiff the following writing:

"*Upon an agreement* to finish the fitting up of offices No. 57 Broadway, in two weeks from date you can begin at once."

Without replying to this note plaintiff at once began work upon the offices. The next day defendant countermanded the offer, but not till after plaintiff had incurred expense and performed a portion of the work. The plaintiff insisted that the contract was completed by his proceeding to comply with the offer without notice of acceptance. But the court held that the language of the offer clearly required notice of acceptance before beginning work.

If the language of defendant's note had been, "Upon receipt of this note you can begin at once," defendant would not have claimed that notice of acceptance was required. Or if it had read, "Fit up my offices in accordance with the enclosed specifications, and I will pay you one hundred dollars," plaintiff might have done the work without notice of acceptance, and would thus have been entitled to recover the one hundred dollars.

If A telegraphs B, "Come to New York to-morrow and I will pay your expense," no notice of acceptance on the part of B is required to make A liable. His going to New York in itself is sufficient to complete his right of action against A for the expense incurred.

[1] Sarbecker *v.* State (1886) 65 Wis. 171; Fragano *v.* Long (1825) 4 Barn. & C. 219; Comm. *v.* Farnum (1873) 114 Mass. 267; Garbracht *v.* Comm. (1885) 96 Pa. St. 449; Tegler *v.* Shipman (1871) 33 Ia. 194; Sc. 11 A. R. 118.

[2] (1871) 46 N. Y. 467.

The principle is also exemplified in offers of rewards or prizes and in the numerous bounty cases against counties, townships and municipalities.[1]

In the case of Reif *v.* Page, *supra*, the defendant's wife was in a burning building. He announced to the crowd that he would give $5,000 to any one who would bring her body out of the building. Plaintiff, a fireman, without any notice of acceptance of the offer, rushed into the building and succeeded in bringing out the wife's body. The court held that he was entitled to recover the reward offered. In Carhill *v.* Carbolic Smoke Ball Company,[2] plaintiff had complied with the terms of a public offer made by defendant wherein promise was made to pay £100 to any one who would use a certain medicine in accordance with the directions and who thereafter should contract the disease it was intended to prevent. Plaintiff contracted the disease after taking the medicine as directed. The court held this a sufficient contract to entitle plaintiff to recover the £100.

And so in all contracts of this character the doing of the designated act completes a binding contract without additional form or ceremony. The principle is well established and is sustained by reason and logic. Not until we come to the subject of guaranty is it questioned or departed from by the courts. It is submitted that no sufficient reason has been given for requiring notice of acceptance in contracts of guaranty, which under similar conditions, would not be required in other contracts. It is often said that an undertaking of guaranty is primarily an offer which does not become binding until accepted, and notice of acceptance given the guarantor; and the proposition is so stated as to imply that the notice is part of the acceptance.[3]

But all offers to be binding must be accepted, and in this respect other offers do not differ from those of guaranty.

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[1] Wentworth *v.* Day (1841) 3 Met. 352; Gillmore *v.* Lewis (1843) 12 Ohio 281; Alvord *v.* Smith (1878) 63 Ind. 58; Cummings *v.* Gann (1866) 52 Pa. St. 484; Loring *v.* City of Boston (1844) 7 Met. 409; Reif *v.* Page (1882) 55 Wis. 496.

[2] (1893) L. R. 1 Q. B. 256.

[3] Saint *v.* Wheeler & Wilson Mfg. Co. (1891) 95 Ala. 362; 36 Am. St. R. 210; Davis Sewing Machine Co. *v.* Richards (1885) 115 U. S. 524; Walker *v.* Forbes (1854) 25 Ala. 139; 60 Am. Dec. 489.

The difference appears in the notice, required in the one but not in the other. This American doctrine that notice of acceptance is required in contracts of guaranty, is said to rest upon the dicta of Chief Justice Marshall in Russell *v.* Clark's Exrs.,[1] and of Justice Story in Cremer *v.* Higginson.[2]

A writes B, "Let C have five hundred dollars' worth of wheat and I will pay you for it." B complies with the request, and immediately has a valid claim against A, on which his right of action is complete. Later A writes B, "Let C have five hundred dollars' worth of wheat and I will see you paid for it." B complies with A's request as before. Can any reason be suggested why in the latter case B must notify A of his acceptance when it is not required in the former? Will not all the necessities of notice in the one case apply in the other?

It is said in Saint *v.* Wheeler and Wilson Sewing Machine Company, *supra*, that until notice of acceptance has been given the guarantor, the obligation does not become binding.

"Till this has been done it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts."

"*Being thus a mere offer it may be recalled as of course, at any time before notice of acceptance.*"

But suppose, (taking the illustration of guaranty above given) B has let C have the wheat, but has not yet notified A of it, may A now any time before he receives notice from B, withdraw his offer of guaranty, and thus leave B without the security upon which alone he may have relied? Certainly this will not be insisted upon, as such a rule would work great hardship, and encourage fraud upon the creditor. He could never be sure after advancing the goods or money on the credit of the guarantor, that his notice of acceptance would reach the guarantor before the guarantor's withdrawal would reach him. It is believed that no court, except in mere dicta, has asserted such a rule, though it is quite true that in a continuing guaranty, which is only a continuing offer to guaranty, the offer may be withdrawn at any time before it is acted upon, but not afterward.

[1] (1812) 7 Cranch 69. [2] (1817) 1 Mason 323.

But why may not such guaranty not be withdrawn after advancements made thereon, but before notice of acceptance? There can be but one answer, and that is that contractual relations are now formed which may not by one party alone be rescinded. The minds of the parties *have* met and a contract of guaranty has been formed, notwithstanding the oft repeated rule that notice of acceptance is required to accomplish this end. It may be that the contract is, as some courts hold, conditional, in which rights may be lost by failure within a reasonable time to give notice. The point here sought to be made is that in the absence of notice of acceptance, no stipulation therefor being made, a guaranty contract is formed by the creditor advancing goods or money on the strength of the proposed guaranty, though it may be a contract upon condition.

In the case of Bishop *v.* Eaton[1] the offer of guaranty was in these words: "If Harry needs more money let him have it, or assist him to get it, and I will see that it is paid." Speaking of this writing the court said:

> "It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done and in such a case the doing of the act constitutes the acceptance of the offer. . . . Where the promise is in consideration of an act to be done *it becomes binding upon the doing of the act, so far that the promise cannot be affected by a subsequent withdrawal of it*, if within a reasonable time afterward he notifies the promisor."

This is authority to the point that there may be a contract without notice, such as will prevent a withdrawal by one of the parties, though to keep it effective notice should be given within a reasonable time.

The question is then at once presented, Is there, where credit is given without notice of acceptance, no contract of guaranty whatever, or is there only a contract upon the condition subsequent that a failure to give notice will terminate it? Is notice a condition precedent to the contract or to the right to sue? It is certain that many of the decisions hold that until notice is given of acceptance, after the creditor has actually advanced upon the credit of the

[1] (1894) 161 Mass. 496.

guaranty, no binding obligation is imposed upon the guarantor.

This view is well illustrated in the case of Craft *v.* Isham.[1] There the promise to guarantee was absolute, though the debt was future with the amount certain.

The writing was as follows:

"Messrs. W. E. and J. F. CRAFT,

GENTLEMEN:

Understanding from Mr. J. B. Turner that he has some proposals from your Mr. J. F. Craft to assist him in his business, if he could procure some friend to become responsible for a part of what should be advanced (say one thousand dollars) at the end of three years, . . . I willingly hold myself responsible to you for the above amount, provided Mr. Turner should fail to pay at the end of said term of three years.

(Signed) JIRAH ISHAM."

Turner was the son-in-law of Isham, who frequently bought goods at his store and daily passed Turner's place of business in going to his office. He had every opportunity of finding out whether or not his guaranty had been acted upon. Craft furnished Turner goods relying upon Isham's promise, but failed to notify Isham that he had done so. Turner failed to pay for the goods and Craft sought to hold Isham on his guaranty. The court, upon a full citation of authorities,[2] held that there could be no recovery because of the lack of notice of acceptance. It must be conceded that these authorities and many more which might be cited, sustain the decision there made.

It would hardly be within the purview of this article to analyze these cases or any number of them, but it seems proper to call especial attention to one or two which are concededly leading cases on this point.

In Babcock *v.* Bryant, the written guaranty was in the following form:

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[1] (1838) 13 Conn. 28.

[2] Russell *v.* Clarks, Excrs. (1812) 7 Canch 69; Edmondston *v.* Drake (1831) 5 Peters 624; Cramer *v.* Higginson (1817) 1 Mason 323; Babcock *et al. v.* Bryant (1831) 12 Pick. 133; Douglas *v.* Reynolds (1833) 7 Peters 113; Lee *v.* Dick (1836) 10 Peters 482; Adams *v.* Jones (1838) 12 Peters 207; Reynolds *v.* Douglas (1838) 12 Peters 497; Sylvester *v.* Crapo (1833) 15 Pick. 92.

[3] (1834) 12 Pick. 133.

"This is to certify that I do hereby agree to be responsible and pay to Messrs. Babcock and Allen; for whatever goods have been, or may be, delivered to Thomas C. Case.

John Bryant. (Security for one year.)"

After receiving this writing plaintiff let Case have goods, for which he failed to pay. He then sought to hold the defendant upon his guaranty, but the court held he could not do so because he had not given notice of having furnished the goods.

In Adams *v.* Jones,[1] the court through Justice Story announced a general rule which has been followed in a great majority of the American courts. It is there said:

"The question which is presented is, whether upon a letter of guaranty addressed to a particular person or to persons generally for a future credit to be given to the party in whose favor it is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary."

The rule was early adopted in Kentucky where in Steadman *v.* Guthrie,[2] the court said:

"It is a general rule if a person offer to pay money upon the performance of an act by another the performance of the act by the latter, without any notice of acceptance of the offer, or of his intent to act upon it, gives him a right to demand the money * * * But * * * where the offer is to guarantee a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor but the creditor must notify the guarantor of his acceptance of the offer, or of his intent to act upon it."

In Taylor et al. *v.* Wetmore et al.,[3] action was brought against the guarantor for goods furnished the principal on the following written guaranty:

"Messrs. A. D. McBRIDE & Co.,

GENTLEMEN:

Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar that we will say that we will be responsible to the amount of $2,000 for goods delivered him.

We are

Truly,

C. W. & S. D. WETMORE."

[1] (1838) 12 Peters 307.
[2] (1862) 4 Met. 147, 156.
[3] (1841) 10 Oh. 490.

The court held that to make the guarantors responsible on this writing, immediate notice must have been given them after goods furnished to the principal. The plaintiff having failed to give such notice for several months thereafter, judgment was given defendants.

These cases with many others[1] representing the majority of the American Courts stand for the rule that *to charge a guarantor upon a written guaranty for future credits to the party for whose benefit the guaranty is given, the creditor must give notice to the guarantor within a reasonable time after extending credit thereon, that he has done so; otherwise the guarantor is not bound.*

In The Louisville Manufacturing Co. *v.* Welch,[2] the court referring to this rule said:

> "The rule requiring this notice within a reasonable time after the acceptance, is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract.*"

It should at this point be noted however that the authorities still leave some features of the rule in much doubt; for notwithstanding the great number of cases which assert it as a sound and reasonable doctrine, it seems uncertain whether the notice required is a mere notice of acceptance of the offer to guarantee the credit, before the credit is given, or whether in addition to this notice of acceptance, another must be given after the goods have been furnished, stating the amount and terms of credit. Does the rule require one notice or two? If only one, which one? Out of this, many interesting problems grow. If the offer of guaranty is made for future credit to a principal, and the proposed creditor accepts the offer, has he thus bound himself in a contract, before extending the credit, for the breach of which an action will lie against him? or after this acceptance and before goods are furnished the principal, is the

[1] Davis *v.* Wells (1882) 104 U. S. 159; Lawson *v.* Townes (1842) 2 Ala. 373; McCollum *v.* Cushing (1861) 22 Ark. 540; Milroy *v.* Quinn (1879) 69 Ind. 406; Kincheloe *v.* Holmes (1846) 7 B. Mon. 5; Bank of Illinois *v.* Sloo (1840) 16 La. 539; Norton *v.* Eastman (1827) 4 Greenleaf 521; Hill *v.* Calvin (1840) 5 Miss. (4 How.) 231; Kellog *v.* Stockton (1857) 29 Pa. St. 460; Oaks *v.* Weller (1841) 13 Vt. 106; Sears *v.* Swift & Co. (1896) 66 Ill. App. 496; Carman *v.* Elledge (1875) 40 Ia. 409; Bushnell *v.* Church (1843) 15 Conn. 406; Taylor *v.* Shouse (1881) 73 Mo. 361; Wilkins *v.* Carter (1892) 84 Tex. 438.

[2] (1850) 10 Howard 461.

guarantor so bound by a contract that he may not withdraw his offer? If he is not yet so bound before credit extended, will the extension of credit after notice of acceptance, but before notice that credit has actually been given, bind him?

These and many more interesting questions will present themselves to any one investigating the effect of adopting this anomalous rule of contracts.

Touching this point Justice Story said in Wilds *v.* Savage[1]:

> "Where guaranty is accepted, and notice has been duly given to the guarantor that the party will act upon it, and give credit and make advances accordingly, I am not aware that it has ever been held that it was indispensable in all cases to give another and further distinct notice to the guarantor of the amount of the advances actually made, and the terms upon which they have been made when the transaction is completed. All I have supposed to be generally required of the person making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is, to make a demand upon the debtor when the credit has expired or the amount has become due, and upon his default to give notice thereof within a reasonable time afterwards to the guarantor."

But surely, if notice in such cases is required at all, it is more important that the guarantor should be informed that advances have been made and the amount and terms, than to receive notice that they will be made. In the first case the creditor may change his mind, and not make the advances. But in the latter case, notice would impose certain and definite obligations upon the guarantor of great importance to him.

X writes Y, "Let Z have $100 and I will see you paid." Y responds that he will do so. But until he does so, X is not bound, and if he is not, neither is Y. This notice of acceptance then has not bound any one, nor yet formed a binding contract. Until the money is advanced either may withdraw from the transaction.

Yet in Louisville Mfg. Co. *v.* Welch,[2] the court holds it of much more importance that this notice should be given, than the notice after the advancement made or the credit extended. In referring to the notice after the advancement made the court says:

[1] (1839) 1 Story 22. [2] (1850) 10 Howard 461.

"We perceive no reason why the rule in respect to notice should be more strict at this stage of the dealings of the parties than at the time when the debt becomes due; or that the guarantor should be discharged for the delay in giving this notice when no loss or damage has resulted to him thereby."

This theory is sustained by cases in other jurisdictions, though as before observed the courts have generally placed greatest emphasis on the necessity for notice after credit has been extended.[1]

That the rule is yet in a formative stage and subject to much explanation and modification by the courts which have adopted it will be seen by an examination of some of the cases. In Davis *v.* Wells,[2] and in Davis Sewing Machine Co. *v.* Richards,[3] it was said that notice of acceptance is not required, first, if the guaranty is signed by the guarantor at the request of the other party; second, if the latter's agreement to accept is contemporaneous with the guaranty; and third, if a receipt from him of a valuable consideration, however small, is acknowledged in the guaranty.

Although the rule was adopted in Ohio as shown in Taylor et al. *v.* Wetmore et al., *supra*, the Supreme Court of that State in Powers and Weightman *v.* Bumcratz,[4] greatly modified and limited it. After a careful review of many cases supporting the rule in reference to notice of acceptance, the court referring to Taylor *v.* Wetmore, says:

"We are aware of the importance of adhering to former decisions, but do not think we are bound by an opinion which it was not necessary to express, and evidently was expressed without a thorough consideration of the question."

In regard to the cases in the United States Court sustaining the rule the court said:

"A regard for uniformity of decisions strongly inclines us to yield to the authority of cases decided by the Supreme Court of the United States. But we cannot do so, when satisfied that a rule has been adopted, as a rule of the common law, as to which there is not a conflict among those authorities recognized as evidence of that law, but an absence of authority."

[1] Low *v.* Bekwith (1853) 14 B. Monroe 184; Central Bank *v.* Shine (1871) 48 Mo. 456; Cahusac *v.* Samini (1856) 29 Ala. 288.

[2] (1881) 104 U. S. 159. [3] (1885) 115 U. S. 524.

[4] (1861) 12 Oh. St. 273.

The same court in Wise *v.* Miller,[1] speaking on this point said:

"It must be admitted that there is irreconcilable conflict in the decisions upon the question, both in regard to the cases in which notice is necessary, and the ground upon which the necessity of notice is placed. Some American cases hold that upon every guaranty for future advances or credit, it is the duty of the party making the advances or extending the credit, to give notice to the guarantor of his acceptance of, and consent to act under, the guaranty; and the tenor of these decisions is that guaranties for future advances or credit, are peculiar mercantile contracts, with an implied condition that notice of acceptance and intention to act under them should be given."

"While the English cases, generally, and many American cases, hold that the rule requiring notice by the guarantee of his acceptance of the guaranty and his intention to act under it applies only where the instrument, being in legal effect merely an offer or proposal, such *acceptance* is necessary to that mutual assent, without which there can be no contract."

It is then said that the latter is the rule in Ohio. But it must be admitted that the distinction between the two rules above stated is not very clear. The court probably intended to use the word "notice" instead of, or in connection with the word "acceptance" in the last clause quoted. It is submitted that no court holds that notice of acceptance is required except where it also holds that the guaranty is, in effect, a proposal or offer which requires an acceptance. The difficult question is not whether the writing is an offer, but whether it is the kind of offer which becomes binding by the performance of the act by the creditor, without notice that such act has been performed, or such offer accepted. The courts frequently draw the line of distinction between what is termed absolute guaranty and collateral guaranty, the former requiring no notice of acceptance and the latter requiring such notice.

These collateral guaranties are always construed to be offers of guaranty. In the construction of these guaranties, the courts differ widely. In one jurisdiction the writing will be construed to be an absolute guaranty, and in another only an offer of guaranty. In fact, the conflict of authorities is found chiefly to lie at this point.

The cases which have departed from the common law

[1] (1887) 45 Oh. St. 388.

rule of contracts have apparently established at least two distinct rules on this subject of notice of acceptance. Those following the decisions of the United States Court hold that all guaranties for future advancements or credits require notice of acceptance within a reasonable time thereafter. While those illustrated by such cases as Milroy *v.* Quinn,[1] Wise *v.* Miller,[2] and Bishop *v.* Eaton,[3] hold that when a guaranty is direct, especially if the amount guaranteed is definite and known to the guarantor at the time his promise is given, notice of acceptance need not be given him, though the advancement has not then been made. But when the guaranty is collateral, that is, when the amount of the debt is uncertain and variable, and the knowledge concerning the amount and time of payment will not or may not come promptly to the guarantor, the creditor is bound to give him notice of his acceptance within a reasonable time after doing that which amounts to an acceptance.

As before indicated, from these two principal rules, will be found branches and exceptions such as those noted in Davis *v.* Wells;[4] but in the main, the great majority of American cases fall within these two channels, both of which it is insisted, are clear departures from the common law rules of contracts. There is a third group of cases representing a very small minority of the States, wherein it is insistently claimed that the common law rule of contracts in reference to notice of acceptance, should be applied to contracts of guaranty. The judges who have written these opinions criticise the courts for the departure they have admittedly made in this branch of the law, and insist with apparent justification that it is unwarranted. They deny that a proposition to stand as guarantor always carries with it an implied condition that notice of acceptance will be given the guarantor. And they strongly dissent from the extreme position taken by the United States Court in The Louisville Mfg. Co. *v.* Welch,[5] where it is held that notice *is deemed essential to an inception of the contract.* For here the holding seems to be that no obligation whatever is

[1] (1879) 69 Ind. 406. [2] (1887) 45 Oh. St. 388.
[3] (1894) 161 Mass. 496. [4] (1881) 104 U. S. 159.
[5] (1850) 10 Howard 461.

imposed upon the guarantor until he receives the notice. According to this view, there would apparently be nothing to prevent his withdrawing his offer after credit was given and before notice of acceptance was received.

Chief among this third group of decisions is Douglas *v.* Howland.[1] Justice Cowen, referring to this question there said:

"I am aware that there is a class of cases which holds that under a contract guaranteeing a debt yet to be made by another, the guarantor is not liable to a suit without notice that the guaranty has been accepted and acted upon. Indeed they go further: If notice of accepting the guaranty be not given within a reasonable time, no debt whatever arises. * * * I will only say that these cases have no foundation in English jurisprudence, where the adjudications are numerous and clear the other way. * * * I may then repeat with great confidence that all the cases requiring notice are American, and depart from the rule of the common law. * * * The guarantor by inquiry of his principal with whom he is presumed to be on intimate terms, may inform himself perfectly whether the guaranty were accepted. * * * Where that can be done, the cases all hold that notice is not necessary even as preliminary to bringing an action, much less to found a right of action."

In Powers *v.* Bumcratz,[2] Gholson severely criticises the rule adopted by the Supreme Court of the United States and cites with approval the position of Justice Cowen. While the decisions in Ohio have so far only resulted in a discussion of the distinction between an absolute guaranty and a mere offer to guarantee, the arguments tend strongly to support the theory that notice of acceptance should be required only when the proposed guaranty expressly provides for it, or the language used strongly implies that this was the condition upon which the proposal was made.

The case of Wilcox *v.* Draper [3] was an action upon the following guaranty:

"The bearer, E. P. Wilcox, wishes to buy a bill of lumber for a house for myself and will want a short time on part of it. If you will accommodate him you will greatly oblige him, and I will see you paid as he agrees. * * *

S. DRAPER."

In suing on the guaranty, plaintiff failed to allege that defendant was notified of the acceptance of the guaranty,

[1] (1840) 24 Wend. 35. [2] (1861) 12 Oh. St. 273.
[3] (1881) 12 Neb. 138; 10 N. W. 579.

and the question was whether this was necessary. After a discussion of many cases bearing on the subject, the Court says:

"The question here involved is presented to this Court for the first time. A desire to conform our rulings, where the authorities are conflicting, to the Supreme Court of the United States, and thus secure uniformity of decisions, inclines us to follow the cases decided by that court. But it is of much greater importance that decisions shall be based upon sound principles and correct law. The rule as to notice in contracts of guaranty was unknown to the common law, yet it is sought to engraft it on our jurisprudence as a common law rule, to attach conditions to the contract of guaranty, which are not applied to other contracts.

When a proposition of guaranty of one party is accepted by the other, this makes a complete contract."

In a number of other States the question has arisen chiefly in the construction of the writing. The question whether the guaranty is absolute or collateral is one purely of construction, in which the decisions cannot be reconciled. It is frequently said that where the guaranty is absolute, notice of acceptance is not necessary.

An examination of the cases below[1] convinces one that the rule requiring notice when the debt is future as announced by the Supreme Court of the United States, is losing its hold, at least in the States from which these cases are cited.

But the courts which agree upon the rule in absolute guarantees, by no means agree upon what is required to make the guaranty absolute. We have seen that there is little difficulty in ordinary contracts, in determining whether an offer is changed to a promise by the uncommunicated act of the offeree; or whether, on the other hand, to complete the contract it is necessary to give notice of his acceptance. The English, and some of the American, courts have found as little difficulty in contracts of guaranty. Looking at the language of the offer, they construe it by the rules which govern generally in such matters. If

[1] Powers *v.* Bumcratz (1861) 12 Oh. St. 273; Whitney & Schuyler *v.* Groob (1840) 24 Wend. 82; Smith *v.* Dann (1841) 6 Hill 543; Carman *v.* Elledge (1875) 40 Ia. 409; Case & Co. *v.* Howard (1875) 41 Ia. 479; Wadsworth *v.* Allen (1851) 8 Gratt. 174; Moore *v.* Holt (1853) 10 Gratt. 284; Snider *v.* Click (1887) 112 Ind. 293; Platter *v.* Green (1881) 26 Kans. 252; Farmers &c. Bank *v.* Kercheval (1853) 2 Mich. 504; March *v.* Putney (1875) 56 N. H. 34.

the offerer has indicated in the writing that it should not take effect until a response thereto is received by him, the courts do not hesitate to enforce this condition.

McIver *v.* Richardson[1] is a leading case on this point. The writing was as follows;

"Messrs. McIver & Co.,

"Gentlemen: As I understand, Messrs. David Anderson & Co., of Quebec, have given you an order for rigging, etc., which will amount to about four thousand pounds. I can assure you from what I know of David Anderson's honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit.

(Signed) John H. Richardson."

"Liverpool, 12th of March, 1811."

In an action on this guaranty, the Court held it to be a mere overture to guarantee, in which notice of acceptance was required.

So in Mozley *v.* Tinkler,[2] where the action was upon the following writing;

"Gentlemen: Mr. France informs me that you are about publishing an arithmetic for him, and I have no objection to being answerable as far as 50 pounds. For my reference, apply to Messrs. Brooke & Co., of this place.

George Tinkler."

In such offers it is plain that the mere performance of the act by the party addressed does not make a binding contract. Further communication is evidently required, and the courts unite in so holding.[3]

W. P. Rogers.

[1] (1813) 1 M. & S. 557. [2] 1 C. M. & R. 692.

[3] For similar proposals, Scribner *v.* Rutherford (1885) 65 Ia. 551; Beekman *v.* Hale (1819) 17 Johnson 134.